SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 373

PEOPLE OF THE STATE OF CALIFORNIA and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners,

vs.

PHILLIPS PETROLEUM COMPANY, UNION OIL COMPANY OF CALIFORNIA, GULF OIL CORPORATION, and MOBIL OIL CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Dated: July 13, 1967

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PEOPLE OF THE STATE OF CALIFORNIA and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners,

vs.

PHILLIPS PETROLEUM COMPANY, UNION OIL COMPANY OF CALIFORNIA, GULF OIL CORPORATION, and MOBIL OIL CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Petitioners, the People of the State of California and the Public Utilities Commission of the State of California (California), respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit entered on April 18, 1967.[1]

1. Petitioners were intervenors in support of the Federal Power Commission, respondent in the court below. Respondents on this petition for a writ of certiorari were the petitioners in the court below.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and is printed in Appendix A. The Federal Power Commission's Opinion and Order Issuing Certificates and Denying Motion for Severance, Docket No. CP64-211, *et al.*, Opinion No. 484 issued on January 6, 1966, is reported at 35 FPC 40 (J.A. 143-158).[2] Its Order Denying Applications for Rehearing and Denying Stay, Docket No. CP64-211, *et al.*, issued March 4, 1966, is reported at 35 FPC 321 (J.A. 216-224). Its Order Denying Application for Rehearing, Docket No. C162-825 issued March 4, 1966 is reported at 35 FPC 333 (J.A. 215-216).

JURISDICTION

The judgments of the Court of Appeals were entered on April 18, 1967, and are printed in Appendix B. Petitioners herein did not petition for rehearing before the Court of Appeals.[3] The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act.[4]

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, are:

> *Section 7(c):* "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the

2. Joint Appendix in the court of appeals.

3. Rule 26 of the United States Court of Appeals for the Tenth Circuit allows twenty days after judgment or decision to petition for rehearing.

4. Act of June 21, 1938, c. 556, § 19, 52 Stat. 831, as amended, 15 U.S.C. 717(r) (1958).

construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

"In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest." [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

* * * * * * *

Section 7(e): "Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

QUESTION PRESENTED

1. In granting certificates of public convenience and necessity to independent producers of natural gas in the Permian Basin pursuant to Section 7 of the Natural Gas Act, did the Federal Power Commission err in issuing certificates with initial prices conditioned to the just and reasonable Permian Basin area rate previously determined by the Commission?

STATEMENT OF THE CASE

This proceeding involves applications for certificates of public convenience and necessity filed by independent producers of natural gas pursuant to Section 7 of the Natural Gas Act for the sale of natural gas from the Permian Basin. They are the first producer certificate applications

to reach the Federal Power Commission (Commission) since its determination of just and reasonable area rates for Permian Basin independent producers in its Opinion Nos. 468 and 468-A.[5]

A. Proceedings Before the Commission

The certificate applications were filed with the Commission prior to the issuance by it of Opinion Nos. 468 and 468-A. Hearings, however, commenced after the issuance of these decisions. In Opinion No. 468 the Commission had set quality standards and base area rates to apply to sales of gas subject to its jurisdiction in the Permian Basin. For the Texas portion of the Permian Basin, the Commission established two base area rates: a higher one at 16.5¢ per Mcf to apply to new gas-well gas, and a lower one at 14.5¢ per Mcf to apply to flowing gas. The date fixed as the cut-off date between flowing and new gas-well gas was January 1, 1961. The base area rates were subject to adjustments for deviations from the quality standards prescribed by the Opinion. Opinion No. 468-A subsequently modified some of these quality standards.

After the close of hearings in this proceeding the Commission granted a motion to waive the Presiding Examiner's intermediate decision and issued its Opinion No. 484 granting certificates. With regard to applicants other than Mobil Oil Corporation (Mobil), the Commission, in condi-

5. *Area Rate Proceeding, et al.,* Docket Nos. AR61-1, *et al.,* Opinion No. 468, 34 FPC 159, issued August 5, 1965; Opinion No. 468-A, 34 FPC 1068, issued October 4, 1965. These Commission orders were reversed and remanded by the United States Court of Appeals for the Tenth Circuit in *Skelly Oil Company, et al. v. Federal Power Commission,* 375 F.2d 6 (10th Cir., 1967), and certiorari was granted by the Supreme Court in *Continental Oil Company, et al. v. Federal Power Commission (The Permian Basin Area Rate Cases),* ..... U.S. ..... (Nos. 1274, *et al.,* October Term, 1966).

tioning the initial price, applied the Permian base area rate for new gas-well gas with provision for determination of appropriate adjustments for quality deviations in accordance with the procedure established in Opinion Nos. 468 and 468-A. The Commission expressly rejected producer contentions that pressure in excess of 500 psi, entitled a producer to an upward adjustment in the price of new gas-well gas.

The Commission found that Mobil's gas met pipeline quality standards, but conditioned the price to the area base rate for flowing gas of 14.5¢ per Mcf rather than the price for new gas-well gas of 16.5¢ per Mcf, rejecting Mobil's contention that its contracts for sale of the gas in Docket No. CI62-825 had been executed after the January 1, 1961, cut-off date. Because Mobil had been selling the gas in question under temporary authorization at the price of 16¢ per Mcf, the Commission deferred decision as to whether refunds should be ordered as a condition to the certificate granted to Mobil.

The Commission also specified, as a condition to the issuance of all certificates, a moratorium on rate increases respecting these sales until January 1, 1968, the same date established in Opinion Nos. 468 and 468-A for moratorium purposes.

B. Proceedings in the Court Below

Four producers[6] sought judicial review of Opinion No. 484 in the United States Court of Appeals for the Tenth Circuit. These cases were briefed before that court issued its opinion and judgment in *Skelly Oil Company, et al. v.*

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6. Phillips Petroleum Co., Union Oil Company of California, Gulf Oil Corporation, and Mobil Oil Corporation. A fifth petition for review filed by Skelly Oil Company was dismissed by order of the court.

Federal Power Commission, 375 F.2d 6 (10th Cir. 1967), which granted all petitions for review which attacked the Commission's Opinion Nos. 468 and 468-A and remanded the cause to the Commission for further proceedings.[7]

In *Skelly*, the court of appeals had declined to accept the Commission's Permian rates because in its judgment these rates had not been measured against the end result test announced in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), stating that on the record presented to the court the rates could not be so measured. It therefore declared that in this review proceeding of Opinion No. 484 it saw no good reason to discuss or decide the points raised by any party. It stated:

> "The Commission's action now before us for review is based on its Permian rates. We have not accepted those rates. The elimination of the base eliminates all rates predicated thereon. . . . We now decide only that the rates fixed by Opinion No. 484 and accompanying orders are disapproved because they are based entirely on the Permian area rates which we have rejected." *Phillips Petroleum Company, et al. v. Federal Power Commission*, ... F.2d ..... (Nos. 8723 *et al.* 10th Cir. April 18, 1967).

REASONS FOR GRANTING THE WRIT

The decision of the court below is premised entirely upon its opinion and judgment in *Skelly Oil Company, et al. v. Federal Power Commission, supra.* That case is presently before this Court for review on petitions for a writ of certiorari, which have been granted. Thus, this Court will soon

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7. This decision by the Tenth Circuit is before this Court for review. *Continental Oil Company, et al. v. Federal Power Commission (The Permian Basin Area Rate Cases)*, Nos. 90 *et al.*, October Term, 1967.

decide whether the Commission's first area rate decisions, Opinion Nos. 468 and 468-A, are valid and lawful.

The views and argument of California supporting the validity of Opinion Nos. 468 and 468-A will be before this Court in *People of the State of California and Public Utilities Commission of the State of California v. Skelly Oil Company, et al.*, No. 100, October Term, 1967, and will not be duplicated here. The decision of this Court in *The Permian Basin Area Rate Cases* will govern, we submit, the proper disposition of this petition for a writ of certiorari. If this Court in those cases reverses the judgment of the court below, thereby affirming the Commission's Opinion Nos. 468 and 468-A, the judgment of the Tenth Circuit in the instant case should be reversed so that the court below may review the questions raised there by the parties. California therefore respectfully requests that this petition for a writ or certiorari be held by this Court until it decides the questions raised in *The Permian Basin Area Rate Cases*. By this procedure, the question whether the instant case should be remanded to the Commission, as now ordered by the court below, or should be reconsidered by that court in the light of this Court's opinion to be issued in *The Permian Basin Area Rate Cases* may be properly decided.

CONCLUSION

Petitioners respectfully submit that this petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be granted, but we urge that the petition should be held by the Court until its decision in *The Permian Basin Area Rate Cases* is issued.

Respectfully submitted,

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Dated: July 13, 1967

(Appendices Follow)

Appendix A

Filed—United States Court of Appeals, Tenth Circuit
Apr 18 1967
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United States Court of Appeals
Tenth Circuit

Nos. 8723, 8778, 8808 and 8829
March Term, 1967

Phillips Petroleum Company; Union Oil Company of California; Gulf Oil Corporation; and Mobil Oil Corporation,
Petitioners,

v.

Federal Power Commission,
Respondent,

Pacific Gas and Electric Company; Southern California Gas Company and Southern Counties Gas Company of California; San Diego Gas & Electric Company; The People of the State of California and The Public Utilities Commission of the State of California; and The State of Texas,
Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

PER CURIAM.

The petitions by independent producers of natural gas seek review of Federal Power Commission Opinion No.

484 and accompanying orders. These relate to § 7 applications for certificates of public convenience and necessity covering jurisdictional sales of natural gas produced from various fields located within the Permian Basin. By its Opinions Nos. 468 and 468-A the Commission fixed area rates for Permian Basin gas. In the instant proceedings, the Commission held that the area rates established by it in Permian were the in-line rates for certification under § 7. The petitioners offered evidence to show that the area rates were not properly applicable and the Commission rejected the offer. It also declined to receive evidence pertaining to the effective date of a contract between petitioner Mobil Oil Corporation and El Paso Natural Gas Company.[1]

In Skelly Oil Company, et al. v. Federal Power Commission, 10 Cir., ... F.2d ....., we granted all petitions for review which attacked the Commission's Permian decision and remanded all cases for further proceedings consistent with our opinion. The cases at bar were briefed before that opinion was rendered. Phillips says in its brief: "To the extent that *Permian* is altered upon judicial review, the instant decision must reflect the result of *Permian*." None of the other petitioners are so explicit. The Commission agrees with Phillips.[2] We declined to accept the Commission's Permian rates because they had not been measured against the end result test announced in Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, and, on the record presented to us, could not be so measured.

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1. This is pertinent because of the Commission's January 1, 1961, date of division between new and old gas-well gas.

2. The statement in the Commission brief is: "We agree with petitioners (Phillips Br. pp. 5-6) that if this Court were to conclude in reviewing the area rate decision in *Skelly* that the prescription of producer rates on an area basis were unlawful or that either the rate or moratorium provisions there require a modification, a remand would be required here."

In the circumstances, we see no good purpose that will be served by a discussion of, or decision on, any of the points raised herein by any party. At the moment they are hypothetical so far as we are concerned. The Commission's action now before us for review is based on its Permian rates. We have not accepted those rates. The elimination of the base eliminates all rates predicated thereon.

We are told that certiorari applications to review our Permian decision will be filed soon in the United States Supreme Court. When area rates for the Permian Basin receive final judicial approval, the issues presented here will be ripe for decision. If we were to decide them now, we would be rendering an advisory opinion. We now decide only that the rates fixed by Opinion No. 484 and accompanying orders are disapproved because they are based entirely on the Permian area rates which we have rejected.

The petitions for review are severally granted and the cases are all remanded to the Commission for further proceedings consistent with this opinion.

Appendix B

United States Court of Appeals
for the Tenth Circuit

TWENTY-THIRD DAY, MARCH TERM,
TUESDAY, APRIL 18th, 1967.

* * * *

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

Phillips Petroleum Company,
Petitioner,

8723 vs.

Federal Power Commission,
Respondent.

Pacific Gas and Electric Company, Southern California Gas Company and Southern Counties Gas Company of California, San Diego Gas & Electric Company, The People of the State of California and The Public Utilities Commission of the State of California, and The State of Texas,
Intervenors.

On Petition for Review of Orders of the Federal Power Commission.

This cause came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered by this court that the petition for review is granted and the case is remanded to the Federal Power Commission for further proceedings consistent with the opinion.

Union Oil Company of California,
Petitioner,

8778 vs.

Federal Power Commission,
Respondent,

Pacific Gas and Electric Company, Southern California Gas Company and Southern Counties Gas Company of California, San Diego Gas & Electric Company, The People of the State of California and The Public Utilities Commission of the State of California, and The State of Texas,
Intervenors.

On Petition for Review of Orders of the Federal Power Commission.

This cause came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered by this court that the petition for review is granted and the case is remanded to the Federal Power Commission for further proceedings consistent with the opinion.

Gulf Oil Corporation,
Petitioner,

8808 vs.

Federal Power Commission,
Respondent,

Pacific Gas and Electric Company, Southern California Gas Company and Southern Counties Gas Company of California, San Diego Gas & Electric Company, The People of the State of California and The Public Utilities Commission of the State of California, and The State of Texas,
Intervenors.

On Petition for Review of Orders of the Federal Power Commission.

This cause came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered by this court that the petition for review is granted and the case is remanded to the Federal Power Commission for further proceedings consistent with the opinion.

Mobil Oil Corporation,
Petitioner,

8829 vs.

Federal Power Commission,
Respondent.

Pacific Gas and Electric Company, Southern California Gas Company and Southern Counties Gas Company of California, San Diego Gas & Electric Company, The People of the State of California and The Public Utilities Commission of the State of California, and The State of Texas,
Intervenors.

On Petition for Review of Orders of the Federal Power Commission.

This cause came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered by this court that the petition for review is granted and the case is remanded to the Federal Power Commission for further proceedings consistent with the opinion.

JUL 17 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 380

PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,
Petitioners,

vs.

PHILLIPS PETROLEUM COMPANY, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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APPENDICES

Appendix A (Citations to Opinions Below)

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In the
Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,

Petitioners,

vs.

PHILLIPS PETROLEUM COMPANY, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Petitioners, Pacific Gas and Electric Company, San Diego Gas & Electric Company, Southern California Gas Company and Southern Counties Gas Company of California, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above case on April 18, 1967.[1]

1. The decision of the Court of Appeals involved four different petitions for review. The respondents to the petition, other than Phillips Petroleum Company, are Union Oil Company of California, Gulf Oil Corporation, and Mobil Oil Corporation.

CITATIONS TO OPINIONS BELOW

The Opinion of the Federal Power Commission is reported in 35 FPC 40, and is printed in Appendix A hereto, beginning at p. 1. The Opinion of the Court of Appeals is as yet unreported, and is printed in Appendix A hereto, beginning at p. 21.

JURISDICTION

The judgment of the Court of Appeals was entered on April 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission, in a Natural Gas Act § 7 (15 U.S.C. § 717f) initial certificate proceeding involving producer rates in the Permian Basin may adopt as the "in-line" price its most recently determined applicable just and reasonable rate as prescribed in its Permian Basin area rate decision.[2]

STATUTE INVOLVED

The statutory provisions involved are sections 7 (15 U.S.C. § 717f), and 19 (15 U.S.C. §717r) of the Natural Gas Act. They are printed in Appendix B hereto, beginning at p. 27.

STATEMENT

This petition presents for review the decision by the Federal Power Commission (Commission) on the first producer certificate applications for the sale of gas from the Permian Basin following the decision by the Commission

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2. 34 FPC 159, as modified by 34 FPC 1068; appealed to USCA (Tenth Circuit), *Skelly Oil Company, et al. v. FPC*, 375 F.2d 6 (1967); *cert. granted*, ... U.S. ..... (1967).

in the Permian Basin area rate proceeding, Opinion Nos. 468 and 468-A (Permian).[3] The matter was heard by an examiner of the Commission more than two months after the issuance of the Commission's decision in Permian (August 5, 1965), and on January 6, 1966 the Commission issued permanent certificates of public convenience and necessity to the producer applicants which certificates were conditioned to a total initial price, including tax reimbursement, not greater than the applicable base area rate of 16.5¢/Mcf established in Permian. Such base area rate was also subjected to further reduction for gas quality deviations as prescribed in Permian.

Subsequently, the producer applicants appealed the Commission's decision on the grounds, among others, that the area rates were not properly applicable. The Court of Appeals granted the producers' petitions for review and rendered an opinion on April 18, 1967, refusing to decide the question of whether the area rate could be applied and remanding the cases to the Commission for further proceedings on the basis that: ". . . [T]he rates fixed by Opinion No. 484 and accompanying orders are disapproved because they are based entirely on the Permian area rates which we have rejected."

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3. This Court has before it for review the Permian Decision which the United States Court of Appeals, Tenth Circuit, reversed and remanded to the Commission. These cases, *Skelly Oil Co., et al., v. The Federal Power Commission*, are set for argument during the October, 1967 term.

REASONS FOR GRANTING THE WRIT

The court below in its opinion refused to decide whether an area rate established after extensive hearings may be adopted as the "in-line" price in a Natural Gas Act § 7 proceeding. The decision on this issue is essential to the orderly administration of producer rate regulation on an area basis under the Natural Gas Act.

If the Commission is unable to apply the area rate determined in proceedings under §§ 4 and 5 of the Natural Gas Act as the rate for sales authorized under § 7, the painstaking and time-consuming effort involved in area rate making will have little prospective application to new supplies of natural gas sold in interstate commerce. By not applying the area rate as the "in-line" price, § 7 proceedings would become a sieve through which excessive prices for new gas, not based on the just and reasonable standard established in the area rate proceedings, will be permitted to flow into interstate commerce. Common sense itself dictates that the Commission cannot reliably use any rate in excess of the area rate as a basis for an "in-line" determination for such a higher rate would in the Commission's opinion be unjust and unreasonable. It is therefore appropriate that the just and reasonable rate determined in an area rate proceeding under §§ 4 and 5 of the Natural Gas Act be used as the "in-line" rate if the consumer is to be afforded needed protection under the Natural Gas Act. (*Atlantic Ref. Co. v. Pub. Serv. Com. of New York*, 360 U.S. 378 (1959).)

CONCLUSION

The question presented herein is timely and of immense importance to the Commission's administration of its responsibility to regulate producer rates. In order that further delay in the establishment of a comprehensive and effective regulatory scheme may be prevented, we respectfully urge this court to grant this petition for a writ of certiorari.

Respectfully presented,

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(Appendices Follow)

Appendix A

United States of America
Federal Power Commission

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, David S. Black, and Carl E. Bagge.

El Paso Natural Gas Company, *et al.*	Docket Nos. CP64-211, *et al.*

OPINION NO. 484

OPINION AND
ORDER ISSUING CERTIFICATES
AND DENYING MOTION FOR SEVERANCE

(Issued January 6, 1966)*

Swidler, Chairman:

Eleven producers[1] of natural gas have applied for certificates of public convenience and necessity pursuant to Section 7 of the Natural Gas Act (Act) authorizing the sale in interstate commerce of natural gas from the Delaware Basin in western Texas. By orders issued March 2, April

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*This opinion was adopted December 29, 1965, before Chairman Swidler left the Commission.

1. Socony Mobil Oil Company (Socony Mobil), Docket Nos. CI62-825, CI65-1355; Phillips Petroleum Company (Phillips), CI64-719; Union Oil Company of California (Successor to the Pure Oil Company) (Union), CI64-1085; the Atlantic Refining Company, (Atlantic), CI64-1130; Gulf Oil Corporation (Gulf), CI64-1153; Skelly Oil Co., (Skelly) Docket No. CI64-1225; Midwest Oil Corporation, CI64-1429; Dalco Oil Co. (Dalco), CI64-1442; W. Watson LaForce, CI65-61; George T. Abell, (Abell) CI65-878; and M.B. Rudman, *et al.*, CI65-930.

27, and June 14, 1965, these applications, as amended and supplemented, were consolidated in this proceeding with two applications by El Paso Natural Gas Company (El Paso) for authorization to construct and operate pipeline facilities to receive and transmit this gas. By order of June 14, 1965, the Commission granted intervention to the People of the State of California and the Public Utility Commission of the State of California, (jointly referred to as Cal-PUC) as well as to four California gas distributors[2] (Distributor Intervenors).

After a prehearing conference on August 26, 1965, a hearing was held on October 19 and 20, 1965. At the close of the hearing, counsel for joint intevenors, Southern California Gas Company and Southern Counties Gas Company, moved that the intermediate decision be waived. On October 25, 1965, the presiding examiner referred the unopposed motion to the Commission, which granted it on November 8, 1965. The proceedings are now before us for decision on the merits.

The Applications of El Paso

El Paso filed its applications in Docket No. CP62-176 and CP64-211 on January 30, 1962, and March 23, 1964, respectively.

El Paso seeks authorization to construct and operate facilities, including pipeline and well ties (with meter runs, dehydrators, and meters) to enable it to receive from the various producers herein natural gas to be purchased in the Gomez, Worsham (Barstow), Coyanosa, and Waha fields in the Delaware Basin area in Pecos and Reeves

2. San Diego Gas and Electric Company, Pacific Gas and Electric Company, Southern California Gas Company and Southern Counties Gas Company.

Counties, Texas, included in Texas Railroad District No. 8 and within the limits of the Permian Basin Area as defined by the Commission.[3] The reserves involved are stated to aggregate approximately 2.1 trillion cubic feet, and to be required for the purpose of augmenting El Paso's overall system gas reserves. Temporary certificates were issued September 24, 1962 and December 11, 1964, authorizing the construction and operation of portions of El Paso's proposed facilities.

All participants in these proceedings support El Paso's application for certificates of public convenience and necessity authorizing the construction of the facilities in question. It appears that the new gas supplies are in close proximity to El Paso's existing facilities. They will be of particular value to El Paso in that the gas-well gas and residue gas derived from gas-well gas provide suitable diversification in the pipeline's gas supply, which now consists largely of casinghead gas and residue gas derived therefrom. The gas-well gas sources will provide El Paso with flexibility and enable it to meet peak demands which may occur in periods when the supply of casinghead gas may be curtailed. Lease reserves are adequate and warrant the construction of El Paso's proposed facilities; the proposed auxiliary facilities are within the authorization conferred by Section 255(a) of the Commission's General Policy and Interpretations; El Paso is able and willing to do the acts and to perform the service proposed and to conform with the Act and all valid rules and regulations promulgated thereunder. Accordingly, permanent certificates will be issued to El Paso.

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3. Some minor miscellaneous services behind the Waha residue gas sales are in Loving County, which is also within District No. 8 and the Permian Basin Area.

Gulf Pacific Pipeline Company (Gulf Pacific) appeared in this proceeding for the purpose of protecting any interests which might be prejudiced in *Transwestern Pipeline Company, et al.,* Docket Nos. CP63-204, *et al.* Gulf Pacific has no objection to issuance of the present certificates so long as it is stated that the issuance of the present certificates shall not prejudice the determinations as to the applications in the other proceeding. El Paso has stated that regardless of the outcome in the other proceeding it would be in the public interest to construct and operate the present facilities. The issuance of certificates in the present proceeding will not prejudice the determination in Transwestern Pipeline Company, *et al.,* Docket Nos. CP63-204 and CP64-91, *Gulf Pacific Pipeline Company,* Docket No. CP63-223 and *El Paso Natural Gas Company,* Docket No. CP64-76.

The Producer Applications

These are the first producer certificate applications for the sale of gas from the Permian Basin to be considered after formal hearing by this Commission since the decision in the Permian Basin Area Rate Proceeding, AR61-1, Opinion Nos. 468 and 468-A. All seek permanent certificates. Temporary certificates to Socony Mobil were issued or amended May 25, 1962, January 30, 1962, June 11, 1964, July 10, 1964, and December 11, 1964. No temporary certificate has been issued to any other producer-applicant therein.

The principal contention of the producer-applicants is that because their gas offers special premium qualities and because their contracts offer special benefits to the purchaser, the gas sold under these contracts should command a price in excess of that which would be permitted under

the quality standards laid down in Opinion Nos. 468 and 468-A. In this contention the producers are supported by El Paso but opposed by the intervenors and the Commission staff.

The premium qualities which the producers contend entitle them to a price above the applicable area rate are high pressure ranging from 985 to 1200 pounds per square inch, great volume, concentrated delivery points, unusual purity, unusually good deliverability, and the availability of the gas for "swing" purposes. This being gas-well gas of high pressure and purity, it can be utilized when El Paso's residue supplies from casinghead gas are lagging, especially in winter when the demand for gas is high. The contract features which would, it is contended, confer unusual benefits upon the purchaser are the notably low amounts which El Paso is required to take in the early years, and take-or-pay makeup clauses extending over the life of the contracts. A witness from El Paso testified that this was the most unique package of gas ever offered to El Paso. While all gas-well gas provides some "swing", the pressure, volume and absence of diluents cause this gas to have greater swing benefits than any other in the area.

According to the brief of Union, which was adopted by five other producers[4] the principal justification for a premium price lies in the unusually high pressure of the gas. Delivery pressures would range from 985 to 1200 pounds. One thousand pounds pressure is not unusual pressure for gas-well gas. Even 1200 pounds is not uncommon in the United States, although it is stated to be higher pressure than that of any other gas available to El Paso in the

4. Atlantic, Gulf, Skelly, Dalco, and Abell.

Permian Basin.[5] We do not feel that a pressure of 985 to 1200 pounds is so unusual or of such unusual benefit to the purchaser as to justify a price bonus.

It may well be that gas sold at these pressures in the Delaware Basin will be of greater benefit to El Paso than if it were to be provided at the 500 pound minimum standard for pipeline quality gas set forth in Opinion No. 468-A; since the wells in question are located in an area in which El Paso does not presently have pipeline facilities, the new pipeline facilities which will be constructed to take the gas may be cheaper, at least initially, than if the gas were to be delivered at lower pressure. However, the 500 pound pressure limits below which we stated in the Permian decision would require price differentials, was not established because we believed that gas at pressures above 500 pounds was entitled to premium rates, but rather because it appeared that in Permian a large percentage of the existing pipeline facilities has been constructed to receive gas at about this pressure, and we did not believe that producers who had sold gas at pressures geared to the available pipeline facilities should be penalized therefor. Thus no provision was made under Opinion No. 468 for premium price for the substantial amounts of gas being delivered at pressures above 500 pounds.

This proceeding is not the proper one for any attempt to amend the standards set forth in the Permian Basin area rate proceeding. We stated in Opinion No. 468: "It will therefore be out [*sic*] policy to certificate new sales of gas in the future at initial prices no higher than the just end reasonable price for new gas * * * unless * * * the Com-

5. The applicable area rates for new gas-well gas were established largely on the basis of the national average cost for new gas-well gas.

mission decides to reopen *this proceeding* to consider whether a different rate or rates should be adopted. * * * We expect that the just and reasonable rate for new gas would constitute the maximum price at which new gas would be initially certified, the so-called "in-line" price, until the just and reasonable rate is changed by the Commission." (p. 113, emphasis supplied).

In the Order Issuing Certificates of August 5, 1965, we reiterated: "As we stated in Opinion No. 468, the just and reasonable rate fixed therein constitutes the "in-line" price required by the public convenience and necessity in granting permanent certificates."

To permit the introduction in the certificate proceeding of evidence directed to obtaining changes in the applicable area rate, whether by the introduction of new quality standards or otherwise, would give rise to delay in the processing of certificates, will result in a great and unnecessary administrative burden, and, in the long run, cause unnecessary expense to the producers. The proper forum for determining any change in area rates, including quality adjustments, is in the area rate proceeding. It should be emphasized, moreover, that these standards (with the exception of Btu content) are minimum standards only. Nor, for the reasons set forth above, do we believe that the present applications signal a situation in which institution of a supplemental proceeding in Docket No. AR61-1 to revise the area rate to provide a premium for gas sold at more than 500 pounds pressure (or sold at the particular pressures involved here) would be warranted or where, pending such a proceeding, we might wish to exercise our discretion to certificate the present sales at prices in excess of the existing Permian ceilings, subject to refund.

Union has stated that if a certfiicate at a premium price is denied it will revise its contract with El Paso to remove some of the unusual benefits conferred by that contract and will deliver the gas at a lower pressure than twelve hundred pounds. It is Union's privilege to bargain with El Paso, subject to approval by this Commission to make sure that grant of a certificate to sell gas spursuant to the modified contract at the price then proposed meets the standards of section 7 of the Act.

Socony Mobil, delivering the residue gas involved in Docket No. CI65-1355 at one thousand pounds pressure, points out that its contract calls for delivery of large volumes of gas (138,700 Mcf daily) concentrated at only two delivery points. We do not think that the price of gas should vary in accordance with its volume, or that a premium price is justified by the concentration of the gas at a small number of delivery points. Socony Mobil gathers this gas for processing at these points for its own benefit—that is, the liquids which Socony Mobil extracts from the gas before delivering the residue to El Paso. Opinion No. 468 makes no provision for an increase in the applicable area rate by reason of either concentrated delivery points or large volumes delivered.

The Exclusion of Cost Evidence

Union and other producers tendered as evidence in this proceeding a cost study prepared by Dr. Stephen F. Sherwin (Tr. 177-190) dealing with the cost of new gas-well gas. His testimony and related Exhibit 23 were excluded by the presiding examiner. It is now contended that the exclusion of the Sherwin testimony and exhibit was error and that any reliance on a 1960-based cost to establish a price for gas to be sold in 1966 is unlawful under the Act and a deprivation of property without due process of law.

It has been determined by this Commission that it is neither necessary nor proper to consider cost evidence in connection with the determination of the price to be charged and collected for gas pursuant to a certificate issued under Section 7 of the Act. The Supreme Court has recently upheld this determination in *United Gas Co.* v. *Callery Properties* December 7, 1965, in which the Court stated:

> * * * We believe the Commission can properly conclude under § 7 that adequate protection to the public interest requires as an interim measure that gas not enter the interstate market at prices higher than existing levels. To consider in this § 7 proceeding the mass of evidence relevant to the fixing of just and reasonable rates under § 5 might in practical effect render nugatory any effort to fix initial prices. * * * (Slip opinion, page 4).

As we stated in Opinion No. 468 and in the Order Issuing Certificates of the same date the just and reasonable area rates fixed in Opinion No. 468 and Opinion No. 468-A, as amended, constitute the "in-line" prices required by the public convenience and necessity in granting a permanent certificate.

The presiding examiner's exclusion of the proffered cost evidence was correct and must be sustained.

Motion for Severance

On October 25, 1965, Socony Mobil filed a motion to sever its Docket No. CI62-825, relating to sales from the Rojas Cabalas Field, from the above-captioned consolidated proceeding and for issuance of a permanent certificate of public convenience and necessity. In this motion for severance, and again in its intial brief Socony Mobil indicated that although the initial price provided by the gas purchase contract is 18¢ per Mcf at 14.65 psia, it is willing to accept

a permanent certificate at the maximum price for new gas-well gas of this quality as defined in Opinion No. 468. That Opinion provides a maximum price for new gas of this quality of gas-well gas of 16.5¢ per Mcf. in the Railroad District from which the gas herein is to be sold. The applicable area rate under contracts dated prior to January 1, 1961, is 14.5¢ per Mcf.

Although the gas purchase contract with El Paso involved herein bears a date of December 28, 1960, Socony Mobil maintains that the contract was actually "executed" by it on March 2, 1961, and by El Paso on March 3, 1961, which dates are subsequent to the cutoff date for new gas-well gas as defined in Opinion No. 468 (at page 131), *i.e.*, January 1, 1961. In Opinion No. 468-A the Commission indicates that it had chosen "the date set forth in the contract" as determining whether contracts should be classified as contracts for new or old gas.[6]

An examination of the gas purchase agreement entered into between El Paso and Socony Mobil shows the signatures of the vice president of El Paso and the attorney-in-fact of Socony Mobil set forth at the end of the agreement after the final paragraph, which states that "The parties hereto have caused this agreement to be duly executed in duplicate originals, on this the day and year first above written." The reference, of course, is to the date in the first paragraph of the agreement, i.e., December 28, 1960.

The attorney-in-fact for Socony Mobil by affidavit of September 17, 1965, states that although the agreement

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6. In their Joint Application for Rehearing, the producers attacked the contract date as the cutoff date for the maximum new gas price and argued for the date when deliveries are actually begun, *i.e.*, when the gas was first committed to interstate commerce. This contention was rejected in Opinion No. 468-A, p. 10.

bears the date of December 28, 1960, material changes in the original "proposals" of the parties were negotiated during the months of January and February 1961, and that the contract was not "executed" by him on behalf of Socony Mobil until after February 28, 1961, the exact date of execution being on or about March 2, 1961.

Socony Mobil has submitted copies of nine letters exchanged between El Paso and Socony Mobil purporting to show that the contract negotiations between the parties were continuing on and after January 1, 1961. No matter what construction be placed on the correspondence between the parties subsequent to December 28, 1960, the fact remains that we are faced with a signed document dated December 28, 1960. Strictly speaking, Socony Mobil does not assert that there is any misunderstanding *between the parties* as to the terms of the agreement, including the date set forth therein. In other words, Socony Mobil does not maintain that there was any mistake as to the intention of the parties to date the contract as it appears upon its face.

We feel that to allow the employment of extrinsic evidence to change the date which appears on the face of a contract would open the door to unverifiable assertions as to the date when a contract was "executed". The latter is a conclusion of law—not a statment of fact. In the last analysis, there is a question of public policy involved herein, which would make it not only hazardous, but administratively impossible to accept extrinsic evidence to show that the date of "execution" is later than the date which appears on the contract.

We believe that the rule adopted in Opinion No. 468-A (page 10) which classifies contracts for new or old gas on the basis of "the date set forth in the contract" is one which is supported by common sense, and the only rule which

can be administered practically without the necessity for investigating the unique circumstances surrounding every contract submitted to the Commission. That date is precise, definite, and certain. It is conceded that the gas in question is of pipeline quality in all respects and a permanent certificate will be issued to Socony Mobil at the full area base rate of 14.5¢ per Mcf applicable to flowing gas.

Procedure for Fixing Price Variations Due to Quality Deficiencies

The question remains as to the procedure to be followed in establishing variations from the base area rates resulting from the quality deficiences of gas to be sold by producer applicants other than Socony Mobil. We think in the case of certificate applications filed subsequent to the issuance of Opinions No. 468 and 468-A that the necessary information should be filed at the same time as the application itself. The applications in this proceeding, however, were filed prior to the issuance of those opinions and the applicants could have no way of knowing precisely what material should be filed. Accordingly, we think that the same procedure should be followed with respect to these applications as was laid down in the Order Issuing Certificates issued August 5, 1965, contemporaneously with Opinion No. 468. We agree that notice should be given to all interested participants as to the material upon which the ultimate price determinations will be based. Accordingly, the order herein will direct that each producer-applicant shall serve upon Distributor Intervenors and upon Cal-PUC, as well as all other participants who request it, copies of material filed for the purpose of establishing price variations resulting from quality deficiencies. In order to allow the producer-applicants to be aware of

the initial price allowed them before accepting their certificates, the time for acceptance of the certificates will be extended until 30 days after the price, including adjustments for quality deviations, is finally determined.

Moratorium

We think that the public convenience and necessity requires the imposition of a moratorium upon all filings by the producer-applicants of increases in price in excess of the applicable area rates before January 1, 1968. This moratorium will not apply to price increases which do not exceed the applicable area rates, and if area rates are adjusted upward prior to January 1, 1968, the producer-applicants will be permitted to file for increases which do not exceed the new area rates of their permitted contract rates, whichever is lower.

The Commission finds:

(1) El Paso is engaged in the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale for ultimate public consumption and is a "natural gas company" within the meaning of the Natural Gas Act.

(2) Each producer applicant herein for a certificate of public convenience and necessity is a natural-gas company within the meaning of the Natural Gas Act as an independent producer of natural gas, as that term is defined in section 154.91(a) of the Commission's Regulations, engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption and such sales together with the construction and operation of any facilities therefor are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Applications for certificates of public convenience and necessity, in due form, have been filed by all applicants herein.

(4) The amount of lease reserves is adequate to warrant the construction of the facilities proposed for their connection.

(5) The need of El Paso for the facilities and reserves proposed herein is consistent with the market and reserve showing presented by El Paso in the proceeding at Docket No. CP63-204 *et al.*

(6) The acquisition of reserves and the construction and operation of facilities as proposed by El Paso herein are consistent with the public convenience and necessity independent of El Paso's applications in Docket No. CP64-76.

(7) The construction and operation of the facilities proposed by El Paso herein is feasible from the engineering standpoint.

(8) The construction and operation of the facilities proposed herein by El Paso is economically feasible.

(9) The facilities described in El Paso's application in Docket No. CP64-211 and in the evidence herein, and designated as "auxiliary facilities," do not require a certificate of public convenience and necessity, by reason of the provisions of the Commission's General Policy and Interpretations, § 2.55(a).

(10) Each applicant herein is able and willing properly to do the acts and to perform the services proposed and to conform to the provisions of the Natural Gas Act and the requirements, rules and regulations of the Commission thereunder.

(11) The gas of which Socony Mobil Oil Company is seller, involved in these proceedings, meets the quality standards prescribed by the Commission in Opinion No. 468 and 468-A.

(12) The sale of natural gas as proposed herein by each producer applicant herein together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor are required by the public convenience and necessity and a certificate authorizing the same should issue to each of them upon the terms and conditions of the order herein, which terms and conditions are required by the public convenience and necessity.

The Commission orders:

(A) A certificate of public convenience and necessity be and is hereby issued to El Paso Natural Gas Company to construct and operate the facilities described in its applications in Docket Nos. CP62-176 and CP64-211, and in the evidence herein. El Paso shall comply with the provisions applicable to it of paragraph (I) hereof.

(B) Certificates of public convenience and necessity are issued, upon the terms and conditions of this order, authorizing the sales, by the producer applicants herein, of natural gas in interstate commerce for resale, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary for such sales, all as hereinbefore described and as more fully described in the respective applications, amendments, supplements and exhibits in this proceeding.

(C) The certificates granted in paragraph (A) above are not transferable and shall be effective only so long as the applicants continue the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act and the applicable rules, regulations and orders of the Commission.

(D) The grant of the certificates issued in paragraph (A) above shall not be construed as a waiver of the re-

cable area rate as well as the contentions of the parties with respect to the quality and amount of the adjustment for any item in dispute. El Paso may file a separate statement setting forth its views within the period herein provided.

(2) The statement filed hereunder which reflects full agreement between the seller and El Paso shall be deemed accepted by the Commission, unless the Commission, within 60 days after such filing, shall otherwise order. In the event of disagreement between the seller and El Paso or, where the Commission otherwise determines that the statement filed is inconsistent with the provisions of ordering paragraph (B) of Opinion No. 468, as modified by Opinion No. 468-A, the Commission will, after appropriate proceedings, prescribe the applicable area rate to be applied as of the date of first deliveries of gas by each producer-applicant to El Paso under the contracts here involved.

(J) Copies of all filings made pursuant to ordering paragraphs (H) and (I) hereof shall be served at the time of filing upon all intervenors herein other than Gulf Pacific and upon all other participants who within 45 days of the issuance of this order shall so request in writing.

(K) Any participant shall have 20 days to respond to any statement, brief or memorandum filed pursuant to ordering paragraphs (H) or (I) hereof.

(L) The certificates granted to the producer applicants, other than Socony Mobil Oil Company, Inc. are hereby conditioned to a total initial price, including tax reimbursement, no greater than the applicable base area rate of 16.5 cents per Mcf at 14.65 psia subject to further reductions, effective as of the effective date of this order, for any quality deviations as determined pursuant to ordering paragraph (I) hereof, and further conditioned upon the filing

by the respective applicants within 30 days of the determination of such rate of a supplement to its filed rate schedule reflecting the applicable area rate in lieu of any rate provided in the rate schedule then on file, and further conditioned upon refunds being made with interest by each applicant of the difference between the applicable area rate and any rate in excess thereof collected subsequent to the effective date of this order. The manner and time of such refunds shall be determined by the Commission in a later order.

(M) Should the quality of the gas delivered at any time deviate from the quality standards set forth in ordering paragraph (B) of Opinion No. 468-A so as to require a downward adjustment to the existing rate, a notice of change in rate must be filed pursuant to the provisions of Section 4 of the Natural Gas Act; *provided, however,* that adjustments reflecting changes in Btu content shall be computed by the applicable formula set forth in Opinion No. 468, as modified by Opinion No. 468-A, and charged without the filing of a notice of a change in rate.

(N) Each certificate granted to a producer-applicant herein is issued upon the condition that the applicant shall not file any change in rate providing for a price in excess of the applicable area rate prior to (1) subsequent order of the Commission in this proceeding permitting such filing or (2) January 1, 1968, whichever is earlier.

(O) Each certificate granted to a producer-applicant herein is issued upon the condition that the proposed rate schedule of the applicant shall be amended by the inclusion of the following language:

> "From the effective date of the order of the Federal Power Commission in the Permian Basin Area Rate Proceeding AR61-1, until January 1, 1968, no increase in rates may be filed, except in compliance with a spe-

cific order of the Commission, at a rate in excess of the applicable area rate as determined pursuant to said proceeding or pursuant to later order of the Commission. Applicable area rate, as that term is used herein, shall mean the rate to be determined after all adjustments from the ceiling price because of deviations from the pipeline quality standards established in the aforesaid order of the Commission."

(P) The issuance of certificates in this proceeding shall not prejudice the determination in *Transwestern Pipeline Company, et al.,* Docket Nos. CP63-204 and CP64-91, *Gulf Pacific Pipeline Company,* Docket No. CP63-223 and *El Paso Natural Gas Company,* Docket No. CP64-76.

By the Commission.

(SEAL)

Joseph H. Gutride,
Secretary.

Filed—United States Court of Appeals, Tenth Circuit,
Apr 18 1967
William L. Whittaker, Clerk.

United States Court of Appeals
Tenth Circuit

Nos. 8723, 8778, 8808 and 8829
MARCH TERM, 1967

Phillips Petroleum Company; Union Oil Company of California; Gulf Oil Corporation; and Mobil Oil Corporation,
Petitioners,

vs.

Federal Power Commission,
Respondent,

Pacific Gas and Electric Company; Southern California Gas Company and Southern Counties Gas Company of California; San Diego Gas & Electric Company; The People of the State of California and The Public Utilities Commission of the State of California; and The State of Texas,
Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

PER CURIAM.

The petitions by independent producers of natural gas seek review of Federal Power Commission Opinion No. 484 and accompanying orders. These relate to § 7 applications

for certificates of public convenience and necessity covering jurisdictional sales of natural gas produced from various fields located within the Permian Basin. By its Opinions Nos. 468 and 468-A the Commission fixed area rates for Permian Basin gas. In the instant proceedings, the Commission held that the area rates established by it in Permian were the in-line rates for certification under § 7. The petitioners offered evidence to show that the area rates were not properly applicable and the Commission rejected the offer. It also declined to receive evidence pertaining to the effective date of a contract between petitioner Mobil Oil Corporation and El Paso Natural Gas Company.[1]

In Skelly Oil Company, et al. v. Federal Power Commission, 10 Cir., ... F.2d ....., we granted all petitions for review which attacked the Commission's Permian decision and remanded all cases for further proceedings consistent with our opinion. The cases at bar were briefed before that opinion was rendered. Phillips says in its brief: "To the extent that *Permian* is altered upon judicial review, the instant decision must reflect the result of *Permian*." None of the other petitioners are so explicit. The Commission agrees with Phillips.[2] We declined to accept the Commission's Permian rates because they had not been measured against the end result test announced in Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, and, on the record presented to us, could not be so measured.

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1. This is pertinent because of the Commission's January 1, 1961, date of division between new and old gas-well gas.

2. The statement in the Commission brief is: "We agree with petitioners (Phillips Br. pp. 5-6) that if this Court were to conclude in reviewing the area rate decision in *Skelly* that the prescription of producer rates on an area basis were unlawful or that either the rate or moratorium provisions there require a modification, a remand would be required here."

In the circumstances, we see no good purpose that will be served by a discussion of, or decision on, any of the points raised herein by any party. At the moment they are hypothetical so far as we are concerned. The Commission's action now before us for review is based on its Permian rates. We have not accepted those rates. The elimination of the base eliminates all rates predicated thereon.

We are told that certiorari applications to review our Permian decision will be filed soon in the United States Supreme Court. When area rates for the Permian Basin receive final judicial approval, the issues presented here will be ripe for decision. If we were to decide them now, we would be rendering an advisory opinion. We now decide only that the rates fixed by Opinion No. 484 and accompanying orders are disapproved because they are based entirely on the Permian area rates which we have rejected.

The petitions for review are severally granted and the cases are all remanded to the Commission for further proceedings consistent with this opinion.

Appendix B

Rates And Charges; Schedules; Suspension Of New Rates

Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice

to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the

filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

Fixing Rate And Charges; Determination of Cost Of Production Or Transportation

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classi-

fication, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U.S.C. § 717d]

Extension Of Facilities; Abandonment Of Service

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue

burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f (a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U. S. C. § 717f (b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so

operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (d)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall

be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (e)]

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization. [56 Stat. 84 (1942); 15 U. S. C. § 717f(f)]

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company. [56 Stat. 84 (1942); 15 U. S. C. § 717f (g)]

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to

construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. [61 Stat. 459 (1947); 15 U. S. C. § 717f (h)]

Rehearing; Court Review Of Orders

Sec. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any

order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by

substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U.S.C. § 717r]

In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

FEDERAL POWER COMMISSION, PETITIONER

v.

PHILLIPS PETROLEUM COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit in this case, entered on April 18, 1967.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 8-10) is not yet reported. The opinion and orders of the Federal Power Commission (J.A. 143-158)[1] are reported at 35 F.P.C. 40, and its opinion on rehearing (J.A. 216-224) at 35 F.P.C. 321.

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[1] "J.A." references are to the joint appendix in the court of appeals.

JURISDICTION

The judgments of the court of appeals (App. B, *infra*, pp. 11-14) were entered on April 18, 1967. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

The Commission issued permanent certificates of public convenience and necessity authorizing certain independent producers of natural gas to sell at initial rates not to exceed the rates found just and reasonable in the *Permian Basin Area Rate Cases*. The Tenth Circuit, having already set aside the Commission's rate determinations in *Permian*, remanded the present case on the basis of its *Permian* decision. The question presented is whether the court of appeals erred in holding that the Commission's rate determinations in *Permian* were unlawful and for that reason an improper basis for the rate condition in the instant certificates.

STATUTE INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, provides in pertinent part as follows:

Section 7(c), 15 U.S.C. 717f(c):

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the * * * sale of natural gas, subject to the

jurisdiction of the Commission, * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *.

* * * [T]he Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly * * *.

Section 7(e), 15 U.S.C. 717f(e):

* * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

STATEMENT

In a consolidated proceeding under Section 7 of the Natural Gas Act, the Federal Power Commission issued permanent certificates of public convenience and necessity authorizing certain sales of natural gas by independent producers in the Permian Basin on condition that the sales prices not exceed the applicable area rate as determined in the *Permian Basin Area Rate Proceeding*, 34 F.P.C. 159, 418, 424, 1068, 1082. This was in accordance with the policy announced by the Commission in the *Permian* proceeding of conditioning future certificates for Permian sales at the level of the rates found to be just and reasonable in that decision. A moratorium on future rate increase filings, similar to the moratorium in *Permian*, was also imposed here (J.A. 152-153).

The producers had attempted to justify their contract prices (all of which exceeded the *Permian* area rates) on the basis of (1) cost evidence and (2) alleged special premium qualities of the gas and special benefits to the purchaser. In addition, Mobil Oil Corporation sought to show that its contract had been executed after January 1, 1961, so as to qualify for the new gas-well gas price of 16.5¢ rather than the 14.5¢ price applicable to gas-well gas contracts executed prior to that date.

The Commission sustained the exclusion of the proffered cost evidence in reliance on this Court's decision in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 (J.A. 149-150). The Commission held that the attempt to justify the con-

tract prices on the basis of alleged premium features was an effort to modify the applicable area rate, which already reflected quality adjustments, and should be changed only in an area rate proceeding, not in a certificate case. It stated (J.A. 148):

> To permit the introduction in the certificate proceeding of evidence directed to obtaining changes in the applicable area rate, whether by the introduction of new quality standards or otherwise, would give rise to delay in the processing of certificates, will result in a great and unnecessary administrative burden, and, in the long run, cause unnecessary expense to the producers. The proper forum for determining any change in area rates, including quality adjustments, is in the area rate proceeding. * * *

The Commission also declined to consider proffered extrinsic evidence to contradict the date of execution shown on the face of the Mobil contract and held that the *Permian* old gas-well gas price of 14.5¢ per Mcf applied, not the higher 16.5¢ per Mcf new-gas price (J.A. 150-152). The Commission denied petitions for rehearing filed by producers (J.A. 215-224), who then instituted these judicial review proceedings.

While the producers challenged the Commission's adoption in this case of the price and moratorium provisions announced in *Permian* even assuming their validity in *Permian*, and also the Commission's contract-date finding for the Mobil sale, the court of appeals set aside the Commission's orders and remanded the case to the Commission solely on the basis of its decision setting aside the Commission's *Permian*

rate determinations (*Skelly Oil Co.* v. *Federal Power Commission*, 375 F. 2d 6). The court explained (App. A, *infra*, p. 10):

> * * * The Commission's action now before us for review is based on its Permian rates. We have not accepted those rates. The elimination of the base eliminates all rates predicated thereon.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Tenth Circuit set aside the Commission's orders in the present case solely on the basis of the court's *Permian* decision, which is challenged in the *Permian Basin Area Rate Cases*, Nos. 90, etc., this Term, pending on writs of certiorari. If this Court sustains the Commission's *Permian* decision, the present case should be remanded to the Tenth Circuit to decide the issues left open by it.

CONCLUSION

Accordingly, this petition for a writ of certiorari should be held pending the Court's final decision in the *Permian Basis Area Rate Cases*, Nos. 90, etc., this Term, and then disposed of summarily in accordance with that decision.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,
Federal Power Commission.

JULY 1967.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 8723, 8778, 8808 and 8829
MARCH TERM, 1967

PHILLIPS PETROLEUM COMPANY; UNION OIL COMPANY OF CALIFORNIA; GULF OIL CORPORATION; and MOBIL OIL CORPORATION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PACIFIC GAS AND ELECTRIC COMPANY; SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA; SAN DIEGO GAS & ELECTRIC COMPANY; THE PEOPLE OF THE STATE OF CALIFORNIA and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; and THE STATE OF TEXAS, INTERVENORS

ON PETITIONS FOR REVIEW OF
ORDERS OF THE FEDERAL POWER COMMISSION

[Filed April 18, 1967]

* * * * *

PER CURIAM.

The petitions by independent producers of natural gas seek review of Federal Power Commission Opinion No. 484 and accompanying orders. These relate to § 7 applications for certificates of public conven-

ience and necessity covering jurisdictional sales of natural gas produced from various fields located within the Permian Basin. By its Opinions Nos. 468 and 468-A the Commission fixed area rates for Permian Basin gas. In the instant proceedings, the Commission held that the area rates established by it in Permian were the in-line rates for certification under § 7. The petitioners offered evidence to show that the area rates were not properly applicable and the Commission rejected the offer. It also declined to receive evidence pertaining to the effective date of a contract between petitioner Mobil Oil Corporation and El Paso Natural Gas Company.[1]

In Skelly Oil Company, et al. v. Federal Power Commission, 10 Cir., —— F.2d ——, we granted all petitions for review which attacked the Commission's Permian decision and remanded all cases for further proceedings consistent with our opinion. The cases at bar were briefed before that opinion was rendered. Phillips says in its brief: "To the extent that *Permian* is altered upon judicial review, the instant decision must reflect the result of *Permian*." None of the other petitioners are so explicit. The Commission agrees with Phillips.[2] We declined to accept the Commission's Permian rates because they had not been measured against the end result test announced in Federal

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[1] This is pertinent because of the Commission's January 1, 1961, date of division between new and old gas-well gas.

[2] The statement in the Commission brief is: "We agree with petitioners (Phillips Br. pp. 5-6) that if this Court were to conclude in reviewing the area rate decision in *Skelly* that the prescription of producer rates on an area basis were unlawful or that either the rate or moratorium provisions there require a modification, a remand would be required here."

Power Commission v. Hope Natural Gas Co., 320 U.S. 591, and, on the record presented to us, could not be so measured.

In the circumstances, we see no good purpose that will be served by a discussion of, or decision on, any of the points raised herein by any party. At the moment they are hypothetical so far as we are concerned. The Commission's action now before us for review is based on its Permian rates. We have not accepted those rates. The elimination of the base eliminates all rates predicated thereon.

We are told that certiorari applications to review our Permian decision will be filed soon in the United States Supreme Court. When area rates for the Permian Basin receive final judicial approval, the issues presented here will be ripe for decision. If we were to decide them now, we would be rendering an advisory opinion. We now decide only that the rates fixed by Opinion No. 484 and accompanying orders are disapproved because they are based entirely on the Permian area rates which we have rejected.

The petitions for review are severally granted and the cases are all remanded to the Commission for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Twenty-third Day, March Term,
Tuesday, April 19, 1967

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges

No. 8723

PHILLIPS PETROLEUM COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PACIFIC GAS AND ELECTRIC COMPANY; SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA; SAN DIEGO GAS & ELECTRIC COMPANY; THE PEOPLE OF THE STATE OF CALIFORNIA and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; and THE STATE OF TEXAS, INTERVENORS

ON PETITION FOR REVIEW OF
ORDERS OF THE FEDERAL POWER COMMISSION

This case came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered by this court that the petition for review is granted and the case is remanded to the Federal Power Commission for further proceedings consistent with the opinion of the court.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Twenty-third Day, March Term,
Tuesday, April 19, 1967

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges

No. 8778

UNION OIL COMPANY OF CALIFORNIA, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PACIFIC GAS AND ELECTRIC COMPANY; SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA; SAN DIEGO GAS & ELECTRIC COMPANY; THE PEOPLE OF THE STATE OF CALIFORNIA and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; and THE STATE OF TEXAS, INTERVENORS

ON PETITION FOR REVIEW OF
ORDERS OF THE FEDERAL POWER COMMISSION

This case came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered by this court that the petition for review is granted and the case is remanded to the Federal Power Commission for further proceedings consistent with the opinion of the court.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Twenty-third Day, March Term,
Tuesday, April 19, 1967

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges

No. 8808

GULF OIL CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PACIFIC GAS AND ELECTRIC COMPANY; SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA; SAN DIEGO GAS & ELECTRIC COMPANY; THE PEOPLE OF THE STATE OF CALIFORNIA and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; and THE STATE OF TEXAS, INTERVENORS

ON PETITION FOR REVIEW OF
ORDERS OF THE FEDERAL POWER COMMISSION

This cause came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered by this court that the petition for review is granted and the case is remanded to the Federal Power Commission for further proceedings consistent with the opinion of the court.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Twenty-third Day, March Term,
Tuesday, April 19, 1967

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges

No. 8829

MOBIL OIL CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PACIFIC GAS AND ELECTRIC COMPANY; SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA; SAN DIEGO GAS & ELECTRIC COMPANY; THE PEOPLE OF THE STATE OF CALIFORNIA and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; and THE STATE OF TEXAS, INTERVENORS

ON PETITION FOR REVIEW OF
ORDERS OF THE FEDERAL POWER COMMISSION

This case came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered by this court that the petition for review is granted and the case is remanded to the Federal Power Commission for further proceedings consistent with the opinion of the court.

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SUPREME COURT, U. S.

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Nos. 373, 380, 385

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

PEOPLE OF THE STATE OF CALIFORNIA, ET AL., *Petitioners*
v.
PHILLIPS PETROLEUM COMPANY, ET AL.

PACIFIC GAS AND ELECTRIC COMPANY, ET AL., *Petitioners*
v.
PHILLIPS PETROLEUM COMPANY, ET AL.

FEDERAL POWER COMMISSION, *Petitioner*
v.
PHILLIPS PETROLEUM COMPANY, ET AL.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENT MOBIL OIL CORPORATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 373

PEOPLE OF THE STATE OF CALIFORNIA, ET AL., *Petitioners*

v.

PHILLIPS PETROLEUM COMPANY, ET AL.

No. 380

PACIFIC GAS AND ELECTRIC COMPANY, ET AL., *Petitioners*

v.

PHILLIPS PETROLEUM COMPANY, ET AL.

No. 385

FEDERAL POWER COMMISSION, *Petitioner*

v.

PHILLIPS PETROLEUM COMPANY, ET AL.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT MOBIL OIL CORPORATION

Mobil Oil Corporation (Mobil) submits this single brief in opposition to the petitions in the above-captioned cases, but at the outset expresses its agreement

with Petitioners in Nos. 373 and 385 that the petitions should be held pending final decision in *The Permian Basin Area Rate Cases,* Nos. 90, *et al.,* this Term. Thereafter, if the Commission is affirmed in *The Permian Basin Area Rate Cases,* the petitions should be granted, and this case remanded to the Court of Appeals for a decision upon all substantive issues in light of this Court's decision in *The Permian Basin Area Rate Cases.* However, if the Commission is reversed in whole or in part in *The Permian Basin Area Rate Cases,* the petitions should be granted, and this case remanded to the Commission for an initial administrative determination in light of this Court's opinion in *The Permian Basin Area Rate Cases.*

OPINIONS BELOW

The opinion of the Court of Appeals, reproduced in Appendix A to the petition in No. 373, is reported at 377 F. 2d 278. The opinions and orders of the Federal Power Commission (J.A. 143-158 and 216-224) are reported at 35 F.P.C. 40 and 35 F.P.C. 321.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petitions.

STATUTE INVOLVED

The statute involved is Section 7(c) and 7(e) of the Natural Gas Act, 52 Stat. 822, as amended 56 Stat. 83, 84, 15 U.S.C. §§ 717f(e), reproduced at pp. 2-4 of the petition in No. 373.

QUESTIONS PRESENTED

1. Whether the requirements of Section 7 of the Natural Gas Act and due process of law are met and accorded when the Federal Power Commission auto-

matically applies an "area rate" previously determined under Sections 4 and 5 of the Act to a natural gas sale and application for Section 7 certification initiated after the test year upon which the prior "area rate" is based.

2. Whether the "present and future public convenience and necessity" standard of Section 7 is lawfully applied and due process is accorded when the Commission refuses to consider in a Section 7 proceeding evidence of present and future conditions which update data used in determining a prior "area rate."

3. Assuming the pre-fixed "area rate" may be so applied in subsequent Section 7 cases, whether an "old gas" rate made applicable by the Commission to sales under contracts executed prior to January 1, 1961, lawfully may be imposed as a "conditioned price" applicable to a sale under a contract dated December 28, 1960, but in fact executed on March 2 and 3, 1961, and thus eligible for a "new gas" rate under the Commission's area rate system.[1]

4. Whether the moratorium imposed by the Commission on rate filings in granting this Section 7 certificate is allowable and reasonable.

STATEMENT OF THE CASE

This case involves validity of "conditions" imposed upon a certificate of public convenience and necessity issued to Mobil as an independent producer

[1] If the Commission were affirmed on the first three questions, this case would present the question of whether a retroactive refund liability imposed upon Mobil by the Commission for amounts collected under a Section 7 temporary certificate is allowable and reasonable in this case.

and seller of natural gas under Section 7 of the Natural Gas Act. Pursuant to a temporary certificate issued by the Commission in 1962, Mobil initiated the sale from the Rojo Caballos Field, Pecos County, Texas, which is in the Permian Basin area. The temporary certificate issued by the Commission did not permit sale at the proposed contract price of 18 cents per Mcf, but contained a Commission-prescribed rate of 16 cents per Mcf and *no* provision for or imposition of contingent liability as to possible future refunds of amounts collected at this 16 cent rate.

This sale was continuing on the basis of the temporary certificate and Mobil's application for a permanent certificate was still pending when the Commission issued its Opinion No. 468 in the Permian Basin Area Rate Case on August 5, 1965, prescribing, *inter alia,* a dual-price system of rates for sales in this area on the basis of 1960 cost data adduced in the area rate case. In particulars here pertinent to the "premium quality" gas delivered by Mobil, this system established a rate of 16.5 cents per Mcf for sales of "new gas" under contracts executed on or after January 1, 1961, and a lower rate of 14.5 cents per Mcf for sales of "old gas" under contracts executed prior to that date.

Hearings on Mobil's application and those of other producers in the same general area for a permanent certificate commenced under Section 7 after issuance of Opinion No. 468. At the hearing, producers attempted to present evidence updating the 1960 data upon which the Opinion No. 468 "area rates" were based. In addition, Mobil showed, through a witness

and documentary evidence confirmed by its pipeline purchaser and not cross-examined by counsel for Commission Staff or other parties, that even though its contract was mistakenly dated December 28, 1960, the contract actually was executed on March 2 and 3, 1961, and thus was a contract eligible for the rate of 16.5 cents per Mcf if the Opinion No. 468 system should be applied to impose price "conditions" in the permanent certificate to be issued under Section 7.

After procedures not pertinent here, the Commission issued its decision under Section 7, denoted Opinion No. 484, on January 6, 1966. The Commission (1) affirmed exclusion of all evidence tendered to update the *1960* data upon which the "area rates" in Opinion No. 468 had been prescribed in the earlier "area rate" case; (2) mechanically applied this Opinion No. 468 pricing system to prescribe "conditioned prices" for all certificates issued in this case; (3) refused to consider the evidence as to true execution date of Mobil's contract and its eligibility for the "new gas" price and imposed an "old gas" price of 14.5 cents for this sale; (4) imposed a new, retroactive contingent liability of refunds by Mobil for the difference between this 14.5 cents and amounts collected at 16 cents under the no-refund conditioned certificate previously issued in 1962; and (5) ordered an absolute "moratorium" upon any increase of rates until January 1, 1968.

All such conclusions and "conditions" were challenged by applications for rehearing, and Mobil appended to its application an amendment to its contract executed by the parties to reflect the true execution

date of March 3, 1961. However, the Commission again refused to consider this evidence and denied rehearing.[2]

Mobil and others thereupon sought review under Section 19(b) of the Act, raising as issues validity of each of the Commission's five conclusions and "conditions" enumerated, *supra*. However, prior to the decision by the Court of Appeals, that court reversed and remanded the Commission's Opinion No. 468 (see petitions in *The Permian Basin Area Rate Cases*, Nos. 90, *et al.*, this Term). Therefore, in the instant case, the Court of Appeals granted the petitions for review, but did not pass on the merits of the issues before it, and remanded the case for further proceedings. The Court, noting that the issues raised are "hypothetical" at the moment, stated:

> "When area rates for the Permian Basin area receive final judicial approval, the issues presented will be ripe for decision. If we were to decide them now, we would be rendering an advisory opinion. We now decide only that the rates fixed by Opinion No. 484 and accompanying orders are disapproved because they are based entirely on the Permian area rates which we have rejected."

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[2] Commissioner Bagge dissented as to Commission refusal to consider evidence as to the date of execution of Mobil's contract (J.A. 219-224). The Commission also denied stay pending review, but stay was subsequently granted by the Court of Appeals. Mobil's sale thus is continuing pursuant to the temporary certificate issued in 1962, pending completion of these review proceedings.

ARGUMENT

Depending upon this Court's decision in *The Permian Basin Area Rate Cases,* one of the two following procedures should be followed by this Court in regard to these petitions.

A. Should This Court Affirm the Commission in the Permian Basin Area Rate Cases, Then the Petitions Should Be Granted and the Case Remanded to the Court of Appeals.

As each Petitioner correctly recites, the Court of Appeals did not pass on the merits of any of the issues presented to it in this case. Accordingly, Mobil agrees with its understanding of the requests of the People of the State of California, *et al.,* and the Federal Power Commission in Nos. 373 and 385 to the effect that if this Court affirms the Commission in *The Permian Basin Area Rate Cases* the petitions should be granted, and the case should be remanded to the Court of Appeals for a decision by that court upon all issues presented, but not decided by that court in its initial opinion in this case by reason of its prior reversal of certain portions of the Commission's decision in *The Permian Basin Area Rate Cases.*

Contrary to this position, Petitioners in No. 380, Pacific Gas and Electric Company, *et al.,* imply that this Court should proceed to hear and decide the instant case without regard to the pendency or the outcome of *The Permian Basin Area Rate Cases.* Such action by this Court is not practicable without knowledge of the disposition of *The Permian Basin Area Rate Cases.* Such action would deprive Mobil of the review guaranteed by Section 19(b) of the Act of the issues presented to but not acted upon by the

Court of Appeals, and would require this Court to proceed *de novo* into the complex issues and record without the benefit of an opinion by the Court of Appeals. The course of action proposed by Petitioners in No. 380 would thus be violative of this Court's general practice not "to review an administrative record in the first instance."[3] Thus, Mobil opposes what appear to be the suggestions of Petitioners in No. 380 and joins Petitioners in No. 373 and the Federal Power Commission in No. 385 in requesting that if the Commission is affirmed in *The Permian Basin Area Rate Cases,* these petitions should be granted and this case remanded to the Court of Appeals for consideration there of all issues in light of this Court's opinion in *The Permian Basin Area Rate Cases.*

B. Should This Court Reverse the Commission in Whole or in Part in the Permian Basin Area Rate Cases, Then This Court Should Grant These Petitions and Remand the Case to the Commission for Consideration of the Issues Raised in Light of This Court's Opinion in the Permian Basin Area Rate Cases.

A decision by this Court in *The Permian Basin Area Rate Cases* reversing the Commission in whole or in part will make reconsideration by the Commission of its initial decision in this case, which was based on the assumed validity of its entire opinion in *The Permian Basin Area Rate Cases,* a necessity in order that the Commission's decision will conform to this Court's decision in *The Permian Basin Area Rate Cases.*

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[3] *United States* v. *Great Northern R. Co.,* 343 U.S. 562, 578 (1952). See also *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154, 157 (1965).

Should this Court attempt to decide the issues here presented after a reversal of the Commission in *The Permian Basin Area Rate Cases,* in whole or in part, this Court would be displacing the role Congress has entrusted to the Commission under the Natural Gas Act in making initial administrative determinations. Should this Court remand the case to the Court of Appeals after reversal of the Commission in whole or in part, that court too would be faced with making an initial administrative determination.

Petitioners in No. 373 and No. 385 again seem to support this suggested procedure. The request of Petitioners in No. 380 would seem to require that this Court make initial administrative determinations should it reverse the Commission in whole or in part in *The Permian Basin Area Rate Cases.* Mobil respectfully submits that this is not the proper role or function of this Court.

CONCLUSION

For the foregoing reasons, the petitions should be held pending this Court's decision in *The Permian Basin Area Rate Cases,* Nos. 90, *et al.,* this Term. Thereafter, if the Commission is affirmed in *The Permian Basin Area Rate Cases,* the petitions should be granted and this case remanded to the Court of Appeals for consideration on the merits of the issues there presented in light of this Court's decision in *The Permian Basin Area Rate Cases.* However, should this Court reverse the Commission, in whole or in part, in *The Permian Basin Area Rate Cases,* then this Court should grant these petitions and remand the case to the Commission for a redetermination by it of the

issues involved in light of this Court's decision in *The Permian Basin Area Rate Cases.*

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September 14, 1967



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

CALIFORNIA ET AL. *v.* PHILLIPS PETROLEUM CO. ET AL.;

PACIFIC GAS & ELECTRIC CO. ET AL. *v.* PHILLIPS PETROLEUM CO. ET AL.; and

FEDERAL POWER COMM'N *v.* PHILLIPS PETROLEUM CO. ET AL.

ON petitions for WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Nos. 373, 380 and 385. Decided May 20, 1968.

PER CURIAM.

The petitions for writs of certiorari are granted and the judgments are vacated. The cases are remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *The Permian Basin Area Rate Cases*, 390 U. S. —.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.